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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 354

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST, AND TERENCE P. O'ROURKE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 272–276) is reported at 150 F. 2d 82. The opinion of the district court overruling petitioners' demurrers to the indictments appears at pages 12–17 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered June 14, 1945 (R. 277), and a petition for rehearing (R. 278–287) was denied July 18, 1945 (R. 289). The petition for a writ of

certiorari was filed August 21, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Are employees of a corporate common carrier subject to the provisions of the Interstate Commerce Act amenable to punishment under Section 10 of the Act for collecting and receiving from purchasers of transportation accommodations more than the rates prescribed by the established tariffs and appropriating the difference to themselves?

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, as amended, 49 U. S. C. 1, et seq., and of the Elkins Act of February 19, 1903, c. 708, 32 Stat. 847, as amended, 49 U. S. C. 41–43, are set forth in the Appendix, *infra*, pages 10–13.

STATEMENT

Petitioners Howitt, Lee, and Dewhurst were indicted in the District Court for the Southern District of Florida for conspiracy to violate the Interstate Commerce Act. The indictment charges that Howitt and Dewhurst were employees of the Florida East Coast Railway Company, acting for the carrier in the sale of railroad and

Pullman tickets, and that Lee was employed by the same carrier as a diagram clerk. It is further alleged that the Florida East Coast Railway Company, the connecting carriers, and the Pullman Company are common carriers subject to the provisions of the Interstate Commerce Act, and that lawful rates for passenger accommodations had been published and filed by the carriers with the Interstate Commerce Commission. It is charged that petitioners, while acting as such employees, conspired to collect and receive unjust and unreasonable charges for passenger transportation, in violation of Section 1 (5) of the Act; to collect and receive from certain persons greater compensation for service in the transportation of passengers than would be collected from other persons for similar service, in violation of Section 2; to give undue preference and advantage to particular persons and subject others to undue prejudice and disadvantage, in violation of Section 3 (1); and to collect and receive greater and different compensation for transportation of passengers than specified in tariff schedules filed with the Interstate Commerce Commission, in violation of Section 6 (7). (R. 1–8.)

Petitioner O'Rourke, also employed by the same carrier as a ticket seller, was charged in a separate indictment with committing substantive offenses of the same nature as are involved in the conspiracy indictment against the other petitioners (R. 30–49).

Petitioners' demurrers to the indictments (R. 9–11, 50–53) and their motion for directed verdict (R. 239–241)[1] on the ground that their conduct was not within the purview of the Interstate Commerce Act because it was not alleged or proved that the carrier itself was a principal offender, were overruled by the district court (R. 12–17, 55, 241).

The evidence in the conspiracy case disclosed that during the winter of 1943 great difficulty was encountered by applicants for railroad transportation at Miami, Florida, in obtaining accommodations (R. 125, 159). Certain of the hotels employed persons whose duty it was to procure accommodations for their guests (R. 124, 139, 153, 158, 166, 195). Arrangements were made between the hotel employees and petitioners Howitt, Lee, and Dewhurst to secure such accommodations by payment to petitioners of sums in excess of the regular fares, either by dividing moneys received by the hotel employees from the guests (R. 125, 126, 127, 128, 134, 147, 153, 155, 169, 231, 236), or by the hotel employees paying the excess amounts (R. 127, 128, 130, 131, 133, 134, 141, 153, 155, 156, 157, 159, 161, 166), or by the passenger making the payment (R. 133, 142, 144). There was testimony to the effect that the excess payments were not

[1] The cases were consolidated for trial upon petitioners' motion (R. 100).

gratuities to petitioners, but a condition precedent to securing a ticket (R. 136, 148, 154).

The evidence as to petitioner O'Rourke was in similar vein and showed that he sold railroad accommodations at prices in excess of the published tariffs (R. 183, 184, 197, 206, 207, 216, 217, 221, 232).

Petitioners were each convicted after a jury trial (R. 61, 62). Petitioners Hewitt, Lee, and Dewhurst were each sentenced to imprisonment for a year and a day and to pay a fine of $1,000 (R. 63–66); and petitioner O'Rourke was sentenced to concurrent terms of imprisonment for 18 months on the eight counts on which he was convicted and, generally, to pay a fine of $1,000 (R. 67–68). The convictions were affirmed by the Circuit Court of Appeals for the Fifth Circuit (R. 277).

ARGUMENT

Petitioners contend here (Pet. 2, 6–7), as they did in the courts below, that the prohibitions of the Interstate Commerce Act here involved apply only to agents or employees who act as aiders and abettors of a guilty carrier as a principal, and that since it was neither alleged nor proved that their employer directed or participated in their activities they are not punishable under the Act. We submit that this contention cannot prevail.

The sanctions of Section 10 (*infra*, p. 12) in terms clearly apply to employees of a corporate carrier, who act without the participation or

connivance of the carrier. It punishes activities made unlawful by Sections 1 (5) (a), 2, 3 (1), and 6 (7) when performed by a common carrier or, if the carrier is a corporation, by any director or officer thereof, and also "any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who alone or with any other corporation, company, person, or party," shall wilfully do an act prohibited or omit to do an act required to be done.

The question was first determined adversely to petitioner's contention in *United States* v. *Tozer*, 37 Fed. 635 (E. D. Mo.), a prosecution against an agent of a carrier for charging a shipper of sugar at a greater rate than was charged another shipper. The court rejected the contention that the indictment was bad because it failed to allege that the defendant had authority to do the acts charged, holding (p. 639) that "when an agent of a railroad is prosecuted under the statute [Section 10] for an unlawful act, it is not necessary * * * either to allege or prove that the particular unlawful act complained of was done under authority conferred by his principal, or by its direction." The *Tozer* decision was expressly approved by the late Chief Justice Taft, then Circuit Judge, in *Toledo, A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730, 736 (C. C. N. D. Ohio), affirmed, *In re Lennon*, 150 U. S. 393. *United States* v. *Estes*, 6 F. 2d 902 (N. D.

Ill.), is to the same effect. Cf. *Union Pacific R. Co.* v. *U. S.*, 313 U. S. 450, 462–463.

United States v. *Peterson*, 1 F. 2d 1018 (D. Mont.), is the only decision to the contrary. In sustaining a demurrer to an indictment charging that the defendant, "while and as" agent for a carrier, sold embezzled tickets for less than the established rate, the court relied upon the provision of the Elkins Act imputing to the carrier any "act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, * * * acting within the scope of his employment" (49 U. S. C. 41 (2), Appendix, *infra*, p. 13), and held that by virtue of this provision persons other than the carrier

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This was a prosecution for charging less than the established rate for Pullman accommodations. In overruling a demurrer to the indictment the court stated (p. 905):

"The contention that the words 'acting for or employed by,' in connection with part of section 10, involved the charge of collusion between the carrier and the one acting for the carrier, cannot be sustained. To construe section 10 so narrowly would be to open the floodgates to a line of violations of the Interstate Commerce Law which would be exceedingly detrimental to the public interest. It was undoubtedly the intention of Congress to put an end to discriminations against certain persons and in favor of others using the facilities of a carrier. It is argued that, while the line of conduct charged in the indictments in these cases might have amounted to fraud or graft, still it did not amount to a violation of section 10. It was undoubtedly the purpose of Congress to hold for criminal misconduct, not only the carrier, but any officer, director, agent, or other person acting for or employed by the carrier who might be in control of the facilities for rendering service, or the service, which the passenger desired to use."

itself may be punished only when they act as aiders and abettors of the carrier; that "taking the statutes as a whole, it seems clear their intent is to include the employee only when 'acting within the scope of his employment' and thereby imposing equal guilt upon the carrier" (p. 1019). The error of this decision lies, we think, in construing this section of the Elkins Act as limiting the application of Section 10 of the Interstate Commerce Act to employees acting within the authority conferred upon them. It is clear, however, that the Elkins Act has no such effect and that its sole purpose in this regard was to impute to carriers the acts or omissions of its agents and employees.

There is no merit in petitioner's further assertion that the provisions of the Interstate Commerce Act here involved "are so vague, indefinite and insufficient as not to cover the facts" (Pet. 7). While it may be that the specific transactions involved in these cases were not contemplated when the statute was enacted, nevertheless "while a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope." *Browder* v. *United States*, 312 U. S. 335, 339–340. The substantive provisions of the Interstate Commerce Act prohibiting the practices which petitioners engaged in clearly establish ascertainable standards of guilt in respect of the lawful charges which may be made for transportation services. The schedule of rates filed by

the carrier with the Interstate Commerce Commission, as required by Section 6 (7), provides the criterion in determining whether a given charge is unjust and unreasonable within the meaning of Section 1 (5) (*Kinnavey* v. *Terminal Ry. Assn. of St. Louis*, 81 Fed. 802 (C. C. E. D. Mo.), cited with approval in *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426) or constitutes an undue or unreasonable preference prohibited by Section 3 (1). *Hocking Valley Ry. Co.* v. *United States*, 210 Fed. 735 (C. C. A. 6), certiorari denied, 234 U. S. 757. The remaining substantive provisions involved, Sections 2 and 6 (7), are explicit in prohibiting discrimination between persons in respect of charges for transportation services and charges in excess of those specified in the tariffs filed with the Interstate Commerce Commission.

CONCLUSION

The decision below is clearly correct and no such conflict of decisions exists as to call for further review by this Court. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1945.

APPENDIX

The Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, as amended, 49 U. S. C. 1, et seq., provides:

Section 1. (5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 2. If any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Section 3. (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or ad-

vantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 6. (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 10. (1) Any common carrier subject to the provisions of this part, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this part prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this part required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this part to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this part for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

The Elkins Act of February 19, 1903, c. 708, 32 Stat. 847, as amended, 49 U. S. C. 41–43, provides in part:

Section 1. Anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. * * *

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

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